CONSTITUTIONALITY OF THE SHERMAN ANTI-TRUST ACT OF 1890,

AS INTERPRETED BY THE UNITED STATES SUPREME COURT IN THE CASE OF THE TRANS-MISSOURI TRAFFIC ASSOCIATION.

THE decision of the Supreme Court of the United States in the case of the Trans-Missouri Traffic Association for the first time authoritatively declares the intended scope of the provisions of the so called Anti-Trust Act of 1890. In view of such interpretation of the statute, it is now the legal presumption that it was the intention of Congress to prohibit and render criminal every contract in restraint of trade or commerce among the several States or with foreign nations. It matters not how reasonable such a contract may be, how necessary for the protection of the property rights of the contracting parties, how beneficial to the community at large, — all alike are prohibited. As to almost all trading and commercial intercourse among the States, and as to every contract for the export or import of merchandise, the people by this statute may be arbitrarily and unreasonably deprived of liberty to trade and freedom of contract in the pursuit of their ordinary avocations by what were heretofore entirely legitimate business methods. Nearly every commercial contract to some extent restrains and limits trading on the part of the contracting parties. The avowed object of the statute was to prevent only unlawful restraints of trade, but it creates the greatest restraint ever put upon an enlightened people in depriving them of freedom of trade and liberty to contract for the proper, necessary, and essential protection of their own interests. Americans living under a republican form of constitutional government, with supposed inalienable rights and the broadest privileges of individual liberty, are placed by the Trust Act under the ban of illegality and made criminals for doing that which is lawful within their own States and anywhere else in the civilized communities of the world. It is, therefore, not surprising that the realization of the intended scope and legal effect of this statute should have caused dismay in the commercial world, and have created profound misgiving as to the future.

In the dissenting opinion, Mr. Justice White has shown that the Trust Act so interpreted is not only arbitrary and unreasonable, but is "violative of the elementary principles of justice." It is only two years since the Chief Justice of the United States said,[1] in considering this very act, that "acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even *doubtful constitutionality*." In Allgeyer *v.* Louisiana,[2] Mr. Justice Peckham had lately said, speaking of a State statute restraining insurance contracts, "Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendants had a right to perform." The inquiry is therefore suggested whether legislation of Congress which arbitrarily and unreasonably deprives persons of liberty to trade and freedom of contract is not in violation of fundamental individual rights and liberties guaranteed by the fifth amendment of the Constitution of the United States, and whether the so called Trust Act of 1890, as now interpreted, is not unconstitutional and void.

No question could be more momentous than this exercise of federal power, in view of its tendency towards centralization and socialism, and of the vast interests which seem to be threatened. The importance of the subject demands the fullest investigation and the broadest discussion of every point or aspect that can be presented. Such a question is the concern of every citizen. Signs are not wanting that further encroachments upon individual liberty will be attempted. From arbitrary and socialistic measures in any State there is escape into some other and more conservative or enlightened State, but from such federal legislation there is no refuge except expatriation. A policy so inimical to progress and commerce may drive capital into Canada, whose railroads already compete ruinously with our own.

The business interests of the country and all concerned in commercial enterprises and investments must realize that, if the principle of this act be extended, there will be no protection except what may be found in the discretion or moderation — if not the whim or caprice — of the ever changing legislative majority. That should be an intolerable condition in a society professing to exist

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[1] United States *v.* E. C. Knight Co., 156 U. S. 1, 13.

[2] Decided March 1, 1897; 17 Sup. Ct. Rep. 427, 432; 165 U. S. 578, 591.

under a fixed and enduring constitutional government. This apprehension as to the danger of despotic and prejudicial legislation by Congress is not groundless. As so well stated in a famous case by Judge Earl of the New York Court of Appeals: [1] —

"Such legislation may invade one class of rights to-day and another to-morrow, and if it can be sanctioned under the Constitution, while far removed in time we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabric, and usually derange the delicate and complicated machinery of industry, and cause a score of ills while attempting the removal of one."

What is the extent of the power of Congress to regulate commerce? Are there no limitations? May not there be such a perversion of the power as to require the nullification of the attempted legislation? Surely, this power to regulate cannot involve the power to destroy. The theory of our government is opposed to the deposit anywhere of unlimited power, unrestrained by the established principles of private rights. No legislative powers in Congress or in the State legislatures are absolute and despotic. Arbitrary and unreasonable federal laws depriving individuals or corporations of their property rights or of freedom of contract conflict with the fifth amendment of the United States Constitution, just as similar arbitrary and unreasonable State laws are nullified by the fourteenth amendment.

The question argued and decided in the Trans-Missouri case was as to the legal import of the words used in the statute. The Supreme Court decided that the language was plain and unlimited, and seems to have declined the task of making by judicial construction a law which Congress did not enact. Its province was to interpret general language of the broadest scope, and the majority felt that they could not justify reading into the act a limitation which Congress had declined or omitted to insert. But the court did not consider or decide any question as to the constitutional power of the legislative body to pass so despotic and arbitrary a measure.

[1] Matter of Jacobs, 98 N. Y. 98, 114.

The first ten amendments of the Constitution of the United States were framed to declare the bill of rights of the people of the United States, and were designed as restraints upon the national government.[1] These amendments originated in the fear of the people that powers not intended to be granted would be claimed by the national government, and that there might be an arbitrary and unreasonable exercise of the authority which had been conferred.[2] The people instinctively dreaded any form of undefined power over their liberties and property.[3] The fifth amendment then adopted applies solely to Congress, and provides that "No person shall be . . . deprived of life, liberty, or property without due process of law." This provision asserts one of the essential immunities of the individual against the legislative, executive, and judicial acts of the general government. It declares a right which "is a large ingredient in the civil liberty of the citizen."[4] When almost eighty years later the fourteenth amendment was framed to restrain the States, the same language was used, and under it have proceeded the decisions which have declared void all unreasonable and arbitrary State legislation violating the requirement of due process of law. In the Sinking Fund Cases, Chief Justice Waite said that "the United States equally with the States are prohibited from depriving persons or corporations of property without due process of law."[5]

It is true that the protection of the fifth amendment has rarely been invoked or discussed during our national existence of over a century, but the explanation lies in the fact that Congress seldom has legislated so as to come in conflict with or to invade individual rights.

Such legislation by the States under the guise of the police or taxing power, however, is being constantly challenged, and at every term of the Supreme Court the docket is crowded with cases arising under the fourteenth amendment. There is a great difference between the commercial power vested in Congress and the police power retained by the States.[6] The distinction between these

[1] Barron *v.* Baltimore, 7 Pet. 243, 247; Spies *v.* Illinois, 123 U. S. 131, 166.

[2] Livingston *v.* Mayor, 8 Wend. 85, 100; McCulloch *v.* Maryland, 4 Wheat. 316, 433; Curtis, Const. History, U. S. 159; Slaughter House Cases, 16 Wall. 36, 82.

[3] 25 Am. Law Review, 880.

[4] Mr. Justice Bradley in Butchers' Union Company *v.* Crescent City Company, 111 U. S. 746, 762.

[5] 99 U. S. 700, 718.

[6] Railroad Company *v.* Fuller, 17 Wall. 560, 568.

powers may be perplexing and difficult to explain, but the courts constantly recognize and observe it.

This historic term, "due process of law," or its equivalent, "the law of the land," under which our race for centuries has been shielded from oppression, and which embodies the foremost of our liberties — regarded even in England as a constitutional right — is not to be narrowed or dwarfed into mere protection against physical restraint of the person or deprivation of the possession of lands or chattels; it embraces every right to individual liberty, to use one's faculties in all lawful ways, to live and work where one will, to pursue any lawful trade or avocation, and to contract in all lawful ways.[1] In the language of Mr. Justice Brewer, "Among the inalienable rights of the citizen is that of the liberty of contract."[2] As the Court of Appeals of New York has said: "It is not necessary, at this day, to enter into any argument to prove that the clause in the bill of rights that no person shall 'be deprived of life, liberty, or property without due process of law,' is to have a large and liberal interpretation, and that the fundamental principle of free government, expressed in these words, protects not only life, liberty, and property, in a strict and technical sense, against unlawful invasion by the government, in the exertion of governmental power in any of its departments, but also protects every essential incident to the enjoyment of those rights."[3] The liberty to adopt and follow a lawful industrial or commercial pursuit is certainly "infringed upon, limited, perhaps weakened or destroyed, by such legislation" as the Trust Act, which renders it criminal for individuals or cor-

[1] In referring to the liberty mentioned in the fourteenth amendment, Mr. Justice Peckham said, in Allgeyer *v.* Louisiana, *supra*, that "the term is deemed to embrace the right of the citizen . . . to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

Judge Charles Swayne (*In re* William Grice, U. S. Circuit Court, District of Texas, February 22, 1897), in holding the Anti-Trust Law of Texas to be void under the fourteenth amendment, said: "It is not necessary to argue that the constitutional privileges which protect the citizen in his life, liberty, or property entitle him . . . to do anything and enter into all contracts usual and necessary in the ordinary avocations of production, manufacture, and trade. Neither the State nor the national legislature possesses any right to limit these natural privileges of contracting or conducting business. Any law which undertakes to abolish these rights, the exercise of which does not involve infringements upon the rights of others, or to limit the exercise thereof beyond what is necessary to provide for the public welfare and general security, cannot be included in the police power of the government."

[2] Frisbie *v.* United States, 157 U. S. 160, 165.

[3] People *v.* King, 110 N. Y. 418, 423.

porations to pursue legitimate business methods, or to make reasonable contracts for the protection of their property rights. If such a regulation of trade had been decreed by the Crown of England before the Revolution, would it not have been declared void because infringing the indivdual rights of the subject? In 1711, the Chief Justice of England (Parker, C. J., subsequently Lord Macclesfield) referred in the case of Mitchel *v.* Reynolds[1] to the provision of Magna Charta, *Nullus liber homo, etc., disseisetur de libero tenemento vel libertatibus, vel liberis consuetudinibus suis, etc.*, and said, "These words have been always taken to extend to *freedom of trade.*"

In New York, the principles of constitutional law, which guarantee freedom of contract, have been repeatedly recognized and enforced, and the true doctrine declared in opinions that leave little to be added. The Jacobs case[2] in 1885, argued by Mr. Evarts, resulted in a decision declaring void the act prohibiting the manufacture of cigars, etc. in tenement houses, on the ground that it deprived the people of rights of property without due process of law. The opinion of Judge Earl in this case is commonly regarded as the strongest presentation of the subject to be found in the reports. It was followed during the same year by the Marx case,[3] in which the oleomargarine law of 1884 was held unconstitutional, the opinion being delivered by Judge Rapallo, who pointed out the folly of permitting such precedents, and said that "measures of this kind are dangerous even to their promoters." Three years later, in the Gillson case,[4] Mr. Justice Peckham delivered the unanimous opinion of our Court of Appeals, holding unconstitutional a statute prohibiting what are known as "gift sales," and said: —

"It seems to me that to uphold the act in question upon the assumption that it tends to prevent people from buying more food than they may want, and hence tends to prevent wastefulness or lack of proper thrift among the poorer classes, is a radically vicious and erroneous assumption, and is to take a long step backwards, and to favor that class of paternal legislation which, when carried to this extent, interferes with the proper liberty of the citzen and violates the constitutional provision referred to. Equally unfounded, and for practically the same reasons, is the assumption that the law is valid as a law regulating trade and for the prevention of fraud and deception. It has no tendency to prevent either, *and its regulation of trade is a mere arbitrary, unreasonable, and*

[1] 1 P. Williams, 181.
[2] 98 N. Y. 98, 102.
[3] People *v.* Marx, 99 N. Y. 377, 387.
[4] People *v.* Gillson, 109 N. Y. 389, 405.

illegal interference with the liberty of the citizen in his pursuit of a livelihood by engaging in a perfectly valid business, conducted in a perfectly proper manner."

In Pennsylvania, Massachusetts, Ohio, Illinois, Michigan, Missouri, West Virginia, and other States, similar decisions are to be found, and a few examples may be mentioned. A statute was enacted in Pennsylvania forbidding manufacturers from paying wages in orders, and it was held to be unconstitutional and void as being an attempt "by the legislature to do what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts."[1] In Massachusetts, an act forbidding the employer from imposing fines upon employees, and withholding wages because of defects in their work, was held unconstitutional as in violation of fundamental rights.[2] The United States Circuit Court in Ohio lately declared unconstitutional a statute forbidding railroad companies from contracting with employees in respect of personal injuries;[3] and in the Ohio Supreme Court last December an act relating to mechanics' liens was held to be void on the ground that it interfered with the constitutional right of contract.[4] In Illinois, several statutes have been set aside upon similar grounds, as may be seen by reference to the cases nullifying the "truck store" act, the "coal-weighing" act, and other legislation.[5] The Michigan courts are equally emphatic in declaring that the right to freedom of contract must be preserved; that this right to contract is included in the right to liberty, and that it is likewise a right of property.[6] Several interesting cases will be found in Missouri holding statutes unconstitutional because attempting to deprive the people of liberty to contract.[7] In one of the decisions, the court said, that the law could not be sustained "unless indeed the doing of such act guaranteed by the organic law the exercise of a right of which the legislature is forbidden to deprive him can, by that body, be conclusively pronounced criminal."[8] The court

[1] Godcharles *v.* Wigeman, 113 Pa. St. 431; see also Waters *v.* Wolf, 162 Pa. St. 153.

[2] Commonwealth *v.* Perry, 155 Mass. 117.

[3] Shaver *v.* Penna. Co., 71 Fed. Rep. 931, 936.

[4] Palmer *v.* Tingle, 45 N. E. Rep. 313.

[5] Frorer *v.* People, 141 Ill. 171; Ramsey *v.* People, 142 Ill. 380; Harding *v.* People, 160 Ill. 459.

[6] Kuhn *v.* Common Council of Detroit, 70 Mich. 534; Spry Lumber Co. *v.* Trust Co., 77 Mich. 199.

[7] State *v.* Loomis, 115 Mo. 307, 312.

[8] State *v.* Julow, 129 Mo. 163, 175.

then added: "We deny the power of the legislature to do this; to brand as an offence that which the Constitution designates and declares to be a right, and therefore an innocent act, and consequently we hold that the statute which professes to exert such a power is nothing more nor less than a 'legislative judgment,' and an attempt to deprive all who are included within its terms of a constitutional right without due process of law." In Colorado, the Supreme Court furnished to the legislature an opinion on the validity of proposed legislation, in which among other things it was said, "The bill submitted also violates the right of parties to make their own contracts, a right guaranteed and protected by the fourteenth amendment to the Constitution of the United States."[1] Similar principles will be found announced elsewhere; and indeed illustrations and reference might be indefinitely multiplied, all tending to establish that such a State statute as the Trust Act of 1890 would be held unconstitutional as conflicting with the fourteenth amendment.[2] If such a law would be unconstitutional because arbitrary and unreasonable, when passed by a State legislature with reference to its internal trade, it must follow that similar legislation on the part of Congress with reference to interstate commerce is equally void, and for substantially the same reasons.

Prior to the passage of the so called Trust Act in 1890, the doctrine of the old common law in relation to the invalidity of contracts in restraint of trade had been considerably modified. The Supreme Court had, in 1889, declared that the rule originated under a condition of things and in a state of society different from those which now exist, and had declared that the question always was whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the agreement was or was not unreasonable. The doctrine that a contract in restraint of trade is void as against supposed public welfare or public policy was founded upon two grounds. One was the injury to the public by being deprived of the restricted party's industry; the other was the injury to the party himself by being precluded from pursuing his occupation, and thus being prevented from supporting himself and his family. But if neither of these evils ensued, and if the contract was founded on a valid consideration

[1] 39 Pac. Rep. 328.

[2] E. g. State *v.* Goodwill, 33 W. Va. 179. 181; *Ex parte* Kuback, 85 Cal. 274; Low *v.* Rees Printing Co., 41 Neb. 127, 136.

and afforded a reasonable ground of benefit to the other party, it was free from legal objection, and was always enforced. This was the law as declared by the Supreme Court in two leading cases.[1] We should not fail to observe the difference between a rule or policy of the courts refusing help to enforce contracts in unreasonable and unnecessary restraint of trade, or to grant damages for their breach, thus leaving the parties to make and terminate the agreement at will, and a law which ordains that such agreements, even when reasonable and just and not injurious to the public, shall constitute criminal offences. This difference is as broad as a gulf.

The books furnish many illustrations of contracts between individuals in restraint of trade which involve no public interest whatever, and which have been adjudged uniformly in England and in almost every State to be lawful because reasonable and necessary and in no sense injurious to the public welfare. Yet now, by the Trust Act, such agreements are made crimes, punishable by imprisonment and fine, if their subject matter involve commerce between the States, or with foreign nations. It has been suggested that the power of Congress and the operations of the Trust Act may be limited to the regulation of the transportation of articles between the States, and that there is little else for this act to take effect upon. But is this not an erroneous view? Chief Justice Fuller seems to have decided the contrary. To quote from his opinion in the Knight case:[2] "Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce."

The extreme danger of intermeddling with trade and industrial pursuits has been frequently emphasized by judges, statesmen, and writers upon political economy. The forms of commercial intercourse and business methods are perpetually varying. Undue innovations interfering with the natural course of trade may be destructive and may paralyze business, while professing to free it from restraints. Sir William Erle, is his essay on the Law Relating to Trade Unions, speaking of the right to contract freely and

[1] Gibbs *v.* Baltimore Gas Co., 130 U. S. 396, 406; Oregon Steam Nav. Co. *v.* Winsor, 20 Wall. 64, 68.

[2] United States *v.* E. C. Knight Co., 156 U. S. 1, 13.

of efforts to regulate restraints of trade, forcibly said:[1] "An attempt to adjust them by statute may succeed, if the authors and interpreters of the statute understand the principles of the common law, and in some degree incorporate them. Without that process, the interpretation of the words of a statute merely by a dictionary leads often to unsatisfactory results. Even if the statute is well drawn, society soon progresses beyond it, and the need of the principles of the common law is constantly renewed."[2]

The governmental power of regulation has been limited and restricted in analogous cases. Twenty years ago, during the Granger movement, the Elevator case in the Supreme Court (Munn *v.* Illinois[3]) caused as great a sensation and created as much alarm as the present decision. The court decided that a State legislature could control the use of the property and regulate the charges of corporations or individuals engaged in any business "clothed with a public interest," as the phrase put it. Many then believed that the rule announced was subversive of the rights of private property. Well founded fears arose that the decision would be followed by legislation ruinous to many enterprises, destructive of all security of investment, and confiscatory in its effects. Such legislation came, and vast damage resulted. It was aimed principally at railroads, which represent property interests exceeding those of any other branch of business, and at various other corporate enterprises. Finally, the intermeddling regulations became so irksome and destructive, and the rates imposed so arbitrary and unreasonable, that the Munn case had to be modified and limited, and the doctrine recognized and enforced that the power in the State legislatures to regulate any such business and to limit charges was not unlimited or without effective restraint. The court declared through Chief Justice Waite, in the so called Railroad Commission Cases, that "this power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation."[4] Then, in the Minnesota Railroad Commission Cases, the Supreme Court set aside the State law because authorizing the imposition of unreasonably low rates, on the ground that such legislation de-

[1] *Vide* pp. 12, 47.

[2] Lord Esher, Master of the Rolls, said (23 Q. B. D. 606) that this essay of Sir William Erle was "more full of careful and accurate law than is to be found in many judgments," and Mr. Justice Harlan quoted from it with approval in his dissenting opinion in the Knight case, 156 U. S., at p. 24.

[3] 94 U. S. 113.

[4] Railroad Commission Cases, 116 U. S. 307, 331.

prived the railroad companies of property rights without due process of law.[1] The power of regulation, which, according to the doctrine of Munn *v.* Illinois, existed in the State legislatures, had to be restricted by the Supreme Court within just and reasonable limits, and the courts held to have the ultimate power of review. So, in the present case, the power of Congress to regulate commerce must be subject to judicial review, and should be limited to reasonable regulations. At the present term of the Supreme Court, Mr. Justice Harlan, in the Covington Turnpike case,[2] delivering the unanimous opinion of the court, reiterated the doctrine, and declared upon the authority of previous decisions that "there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of the property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws."

Another illustration of limits upon governmental powers will be found in the classification cases. It has been repeatedly decided that the States have power to classify property and business for purposes of legislative regulation or taxation, but the Supreme Court has declared that such classification cannot be arbitrary, and must always rest upon some differences which bear a reasonable and just relation to the matter in respect of which the classification is proposed, and can never be made unreasonably and without any such basis. To use language quoted by Mr. Justice Brewer in a late case: "Such classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land."[3]

It may be conceded that, under the doctrine of Munn *v.* Illinois, the legislative power of control, regulation, or restraint over railroad and other quasi-public corporations or monopolies is much broader than in respect of individuals and private trading corporations; but, with all deference, no such consideration can uphold the

[1] Chicago, &c. Railway Co. *v.* Minnesota, 134 U. S. 418; see also Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362.

[2] Covington & L. Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 592.

[3] Gulf, Colorado, & Santa Fé Ry. *v.* Ellis, 165 U. S. 150, 156.

Trust Act. The test of constitutionality is not what may be legitimate as to the particular individuals or corporations before the court, but what may be done within the scope and intention of the statute, or be asserted under its authority.[1] If unconstitutional as to one, the lowliest or the richest, it is unconstitutional as to all. We must judge the law by what it purports to ordain as to individuals engaged in private business pursuits. That is the test of its constitutionality. Can individuals be deprived of liberty of contract in this arbitrary manner? Can they be prevented from entering into reasonable contracts "which may be proper, necessary, and essential" to carrying on a legitimate business, or made criminals for doing what is not injurious to the public, and what has been declared for two centuries here and in England to be lawful and proper? Are they to be prevented from making reasonable contracts in limited and partial restraint of trade? The Trust Act is entire and indivisible; it says "*every contract.*" It cannot be constitutional as to railroads and void as to others coming within the legal import of the unlimited term "*every contract*" as interpreted by the court. Indeed, it would be a strange result if this statute, believed by most people at the time of its passage not to apply to railroad corporations, should by legal construction be declared to be valid only as to railroads. The Trust Act, if unconstitutional as to the contracts of individuals and private trading corporations, is wholly void and must be set aside. It is too broad. This point arose in the Trade-Mark Cases,[2] and it was held that the statute there in question was wholly unconstitutional, because too comprehensive in its scope.

It was then urged that, as Congress had power to regulate trademarks used in commerce with foreign nations and among the several States, the trade-mark statutes might be held valid in that class of cases, if no further; but Mr. Justice Miller in delivering the decision of the Supreme Court held the acts wholly void, and said that, "while it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may

[1] Stuart *v.* Palmer, 74 N. Y. 183, 188; Montana Co. *v.* St. Louis Mining Co., 152 U. S. 160, 170.

[2] 100 U. S. 82, 98.

be punished which are not described in language that brings them within the constitutional power of that body."

The reasoning in the cases mentioned above certainly applies with great force and pertinency to the Trust Act of 1890. In legislating under the police power, the States exercise governmental functions of the highest order, and of a class which the courts will not and ought not to interfere with except in the clearest cases of abuse. Much legislation that seems like intermeddling in private business is upheld because possibly justifiable under some idea of police regulation. But such legislation must have a legitimate end in view, and some fair relation to the health or morals of the community. The power of Congress to regulate commerce, however, is not as broad or as far reaching as the police power of the States, and an act valid under the police power of the States might be unjustifiable, arbitrary, and void as a federal regulation of commerce.

There can be no reasonable doubt that every governmental power in the States or in the federal government must be exercised in subordination and subject to the fundamental rights of the people. Arbitrary and unreasonable regulations cannot be tolerated.

Whatever a State or Congress may enact as a sovereign government in exercising any power, it must do in subordination to the inhibitions of the Federal Constitution, inhibitions which furnish — as Attorney General McKenna lately said in deciding as United States Circuit Judge the California Railroad Commission case — "a doctrine, rational, consistent, safe, giving to property and all interests in it protection against an arbitrary will, and not denying or dissipating the safeguards of the Constitution by refined and metaphysical distinctions."[1]

The constitutional question as to the power of Congress is not mentioned in the opinion of Mr. Justice Peckham in the Trans-Missouri case, or in the dissenting opinion of Mr. Justice White. In view, however, of the vast importance and far reaching effect of this legislation as it now appears in the light of its construction by the court and interpreted as the prevailing opinion has been interpreted in the dissent of Mr. Justice White and in the forum of public opinion, it is to be hoped that a decision will be promptly obtained upon the vital proposition, whether, under the guise of regulating

[1] Southern Pac. Co. *v.* Board of Railroad Com'rs, 78 Fed. Rep. 236, 256.

commerce, Congress can unreasonably and arbitrarily restrain trade and commercial intercourse without violating the fifth amendment. The present decision may, at any rate, be explained and limited so as to remove the grave danger of misinterpretation and misapplication.

Mr. Justice Brewer has well said: —

"The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government." [1]

Theories or notions of public policy cannot limit or regulate our constitutional rights. The public policy of one generation seldom remains that of its successor, and the prevailing opinion of one section of the country is frequently radically opposed to that of another. As has been quaintly said, public policy is an "unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law." [2] The pretence of public policy is ever the mask of reckless politicians competing for the unthinking vote. It is the deadly weapon of socialism and communism. The very object of constitutional restrictions is to establish rules which cannot be varied according to the passion or caprice of a legislature, or the public policy of the hour, and to fix an immutable standard applicable at all times and under all circumstances. When the Constitution speaks, its voice must be heeded, though clashing with the views or wishes of the temporary majority. The paternal theory of government should be odious to us. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, are both the

[1] Gulf, Colorado, & Santa Fé Ry. *v.* Ellis, 165 U. S. 150, 159.

[2] Burrough, J., in Richardson *v.* Mellish, 2 Bing. 229, 252.

limitation and the duty of government.[1] Nor can we protest too strongly against the invasion of the birthright of Americans upon any pretence of public policy. If not checked, the worst forms of socialism will breed under the superstition, so rampant, that legislation is a sovereign cure-all for social ills. The danger now to be dreaded and guarded against is the despotism of the majority, wielding and abusing the power of legislation.[2]

William D. Guthrie.

NEW YORK, April 10, 1897.

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[1] Mr. Justice Brewer, in dissenting opinion, Budd *v.* New York, 143 U. S. 517, 551.

[2] Judge Dillon's Yale Lectures on English and American Laws and Jurisprudence, p. 204.